Supreme Court, U.S.
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No. 96-6

In The

Supreme Court of the United States

October Term, 1995

WILKINSON AND MONAGHAN, a Professional Corporation, and BILL V. WILKINSON,

Petitioners,

vs.

HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, JERRY PULS, M.D., DOUGLAS HUBNER, M.D., JERRY L. PULS, M.D., INC., AND SOUTH UTICA PATHOLOGY LABORATORIES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Oklahoma Divison IV

BRIEF IN OPPOSITION OF RESPONDENTS HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., AND HILLCREST SERVICE COMPANY

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QUESTION PRESENTED

Whether it is a violation of due process for a judge who has presided over ongoing litigation subsequently to rule upon an Application for Sanctions based upon conduct of an attorney occurring during the course of that litigation?

LIST OF PARTIES

Petitioners, Bill V. Wilkinson and Wilkinson & Monaghan, Inc., Petitioners herein, provided representation for Willa Warner, Linda Jones and Merle Levitt, Personal Representatives of the Estate of Norma Levitt, Deceased (who are not parties to this proceeding) in initiating litigation from which this proceeding derives.

Respondents Hillcrest Healthcare Corporation, Hillcrest Medical Center Foundation, Hillcrest Real Estate, Inc., Hillcrest Service Company, Jerry Puls, M.D., Douglas Hubner, M.D., Jerry L. Puls, M.D., Inc. and South Utica Pathology Laboratories, Inc., were all Defendants in that original litigation which also included other entities which are not parties to this proceeding, including Hillcrest Medical Center, Robert Morton, M.D., Christine Jones, CRNA, Tulsa Anesthesiologists, Inc., Frederick Jones, M.D., Gary Breipohl, M.D., Jonathan Anthony, M.D., Robert Spohr, M.D., Thomas Singletary, M.D., Harold Voss, M.D., Don Wiesemeyer, M.D., and Duane Brothers, M.D. Pursuant to Supreme Court Rule 29.6, Respondents state that they are Oklahoma corporations; Hillcrest Healthcare Corporation is the parent corporation of which Hillcrest Medical Center Foundation, Hillcrest Real Estate, Inc., Hillcrest Service Company and Hillcrest Medical Center are subsidiaries.

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I. STATEMENT OF THE CASE

On November 9, 1989, Norma Levitt underwent hip replacement surgery at Hillcrest Medical Center in Tulsa, Oklahoma. Near the end of the surgery, a Certified Registered Nurse Anesthetist, who was not an employee of the hospital, ordered a unit of blood for the patient, and also directed that it be warmed in a microwave oven. The nurse anesthetist was an employee of Tulsa Anesthesiologists, a professional corporation providing the anesthesia services for the surgery. The blood was warmed as directed, and the transfusion began.

Approximately fifteen minutes after the blood was hung, an x-ray was taken and the patient was rolled from her side to her back. At this time, the patient showed signs of breathing problems and oxygen loss, which preceded the stopping of her heartbeat. A code blue was sounded, but the patient could not be revived.

Within six months of these events, Bill Wilkinson, of the firm Wilkinson and Monaghan (hereinafter "Wilkinson") commenced an action as attorney for the estate of the patient, naming only the hospital as defendant. One action was commenced in the District Court of Creek County, State of Oklahoma, which was later transferred to Tulsa County; a second action was commenced in the United States District Court for the Northern District of Oklahoma, which was later voluntarily dismissed. For a year and a half, the hospital was the sole defendant, during which time a considerable record was generated by Wilkinson.

The action commenced in Creek County and transferred to Tulsa County asserted claims on behalf of the estate sounding in tort and contract. Following transfer, Wilkinson filed an Amended Petition purportedly asserting claims on behalf of the individual survivors in their individual capacities. These individual claims (as distinct from those of the estate) were dismissed, at which time Wilkinson filed a separate action reasserting the claims of the individual Plaintiffs. This separate litigation also generated a considerable record.

On November 8, 1991, Wilkinson filed Amended Petitions in both actions, joining an additional twenty Defendants, including the Respondents herein Hillcrest Healthcare Corporation, Hillcrest Medical Center Foundation, Hillcrest Real Estate, Inc., and Hillcrest Service Company (hereinafter "Hillcrest Respondents"), each a distinct corporate entity. Wilkinson admitted to the trial court that these Defendants were named intentionally and purposefully.

The Hillcrest Respondents sought dismissal as improper parties. The trial court declined to dismiss them, but admonished Wilkinson against suing parties with no real basis.

The two underlying actions were consolidated, and the Hillcrest Respondents sought summary judgment and sanctions on the grounds that the hospital alone was involved in the provision of medical services to Norma Levitt; that none of the Hillcrest Respondents were direct providers of medical services, and that none provided services or maintained records regarding Norma Levitt.

At a hearing on the Hillcrest Respondents' motion the trial judge specifically inquired whether Wilkinson had a reasonable basis for keeping the Hillcrest Respondents as Defendants in this action, and warned of possible sanctions should Wilkinson fail to present a case against them at trial. With that admonition, the court overruled the Motion for Summary Judgment. At this time, the Hillcrest Respondents had been parties to both actions for well over a year.

Subsequently, when the Pre-Trial Order was considered by the District Court, Wilkinson was reminded that he needed to evaluate his case as to all Defendants, and was again warned of the possibility for sanctions for suing unnecessary parties.

Wilkinson went to trial against twenty Defendants, presenting his opening statement on April 23, 1993. Three weeks and 4,000 transcript pages later, Wilkinson rested his case.

Wilkinson tried his case on the theory that warming the blood in the microwave oven destroyed the red blood cells, releasing potassium into the blood by the transfusion. However, the maximum recorded potassium level was not toxic. Moreover, the patient's problems did not follow immediately upon commencement of the transfusion, but only after she had been rolled on her back, possibly releasing fatty emboli into her blood stream, clogging her lungs.

The demurrers of fifteen Defendants, including the Hillcrest Respondents, were sustained. The remaining Defendants presented their defense in a single day. The

jury returned a verdict in favor of all remaining Defendants, including the nurse anesthetist, indicating its finding that warming the blood in the microwave oven did not cause the death. The companion case, on behalf of the individual survivors, was then dismissed.

Wilkinson moved for new trial, but was fired by his former clients. New counsel filed an Amended Motion for New Trial, and argued, among other issues, misconduct by Wilkinson. With new counsel, it was possible to settle the underlying claim, and the court did not rule upon the pending Motions for New Trial. No appeal was taken.

The Hillcrest Respondents filed their Motion for Sanctions on June 29, 1993. The hospital at which the underlying events occurred, Hillcrest Medical Center, did not seek sanctions. At the hearing on the Motion for Sanctions, the Trial Court heard the testimony of both attorneys representing the Hillcrest Respondents, along with the attorney for a co-defendant, who offered testimony based upon his actual experience as a participant in the litigation, and who also appeared as an expert witness on behalf of the Hillcrest Respondents. The court held that Wilkinson violated 12 O.S. 1991 § 2011, the state analog to Fed.R.Civ.P. 11, by "signing of the Amended Petition, Response to Motion for Summary Judgment, and Pre-Trial Order . . . " Pet. App. at 40a, Conclusion II. The trial court held that Wilkinson's conduct "constituted bad faith and oppressive behavior and is sanctionable. . . . " Pet. App. at 41a, Conclusion V. Accordingly, the court imposed sanctions upon Wilkinson, awarding each of the Hillcrest Respondents $12,500.00. Pet. App. at 42a-43a, Conclusion VII.

Wilkinson appealed the sanctions, which was assigned by the Oklahoma Supreme Court to Division IV of the Oklahoma Court of Appeals for consideration. The Court of Appeals made an "objective determination" of whether Wilkinson had a "reasonable basis" to commence or prosecute a claim against each of the multiple defendants, as the law requires:

> Our concern is whether the attorney had a reasonable, objectively ascertainable basis to file and maintain the allegations made against the defendants. If at any point in this inquiry we find either that Wilkinson had no reasonable basis in fact or law to initially file the claim, or that after filing the claim he could not produce evidence which would reasonably support the continuation of the claim, we will not hesitate to affirm the trial court's imposition of proper sanctions. However, we will not uphold sanctions for ineffective or even poor presentation of an otherwise viable claim.

Pet. App. at 11a-12a. The Court of Appeals affirmed sanctions in favor of the Hillcrest Respondents, and certain other Defendants (co-respondents herein), but reversed the award in favor of the remaining Defendants. Pet. App. at 31a.

Wilkinson did not argue to the appellate courts of Oklahoma that his right to "due process" was violated by the refusal of the trial judge to recuse himself upon request. Among the sub-propositions argued in his appeal was the contention that "the trial court applied the wrong legal standard." *See* Wilkinson's Brief in Chief filed December 23, 1994 at pp. 24-28. In the course of this argument, Wilkinson suggested a lack of impartiality on

the part of the trial judge, to support his contention of legal error in the decision reached:

> At this juncture, one must question whether the adoption of the wrong standard and the tenor of the trial court's remarks, were a manifestation of an over-zealous judge or a judge that was not impartial.

Wilkinson's Brief in Chief at p. 25. The Oklahoma Court of Appeals, Division IV, did not address the trial judge's decision not to recuse, or any "due process" issues involved therein, in its Opinion filed September 25, 1995. Pet. App. at 1a-31a.

Moreover, Wilkinson did not address the trial judge's decision not to recuse in his Petition for Rehearing filed with the Oklahoma Court of Appeals (Wilkinson did seek to disqualify one appellate judge, and even the entire appellate panel). Likewise Wilkinson did not mention that he requested the trial judge to recuse, or raise any error regarding his failure to do so, in his Petition for Writ of Certiorari filed with the Oklahoma Supreme Court.

II. REASONS FOR DENYING A WRIT

A. WILKINSON'S ISSUE WAS NOT "PRESSED OR PASSED UPON" IN STATE COURT.

This Court should deny Wilkinson's Petition for Writ of Certiorari because the issue which he proposes to present to this Court was not "pressed or passed upon" in the appellate courts of the State of Oklahoma.

Regardless of whether the principle is jurisdictional or prudential, the practice of this Court has been to deny a Petition for Writ of Certiorari where the substantive constitutional claims were not first passed upon by the state appellate courts. In *Yee v. City of Escondido*, 503 U.S. 519 (1992), this Court declined to address a substantive due process issue because it "was not raised or addressed below . . . " *Id.* at 532-533.

> The Yees did not include a due process claim in their complaint, nor did petitioners raise a due process claim in the Court of Appeal. It was not until their petition for review in the California Supreme Court that petitioners finally raised a substantive due process claim. But the California Supreme Court denied discretionary review. Such a denial, as in this Court, expresses no view as to the merits. (citations omitted) In short, petitioners did not raise a substantive due process claim in the state courts and no state court has addressed such a claim.
>
> . . . While we have expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts (citation omitted), we need not resolve the question here. . . . Even if the rule were prudential, we would adhere to it in this case. Because petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here.

503 U.S. at 533. This Court has addressed "the policies that animate the 'not pressed or passed upon below' rule":

> These policies are first, comity to the States, and second, a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal. (citation omitted)

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 79 (1988). In *Crenshaw*, this Court declined to address several constitutional challenges to an award of punitive damages on the grounds that the issues had not been explicitly and squarely presented to the state courts for resolution:

> [A]ppellant's petition for rehearing [to the Mississippi Supreme Court] alleged only that the punitive damages award "was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles." . . . The vague appeal to constitutional principles does not preserve appellant's Contract Clause or due process claims. A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon (citation omitted).
>
> Appellant's reference to the excessiveness of the punitive damages award more colorably raises a cognizable constitutional challenge to the size of the award, one based upon the Excessive Fines Clause of the Eighth Amendment. But this language as well is too oblique to allow us to conclude that appellant raised before the Mississippi Supreme Court the federal claim it now urges us to resolve. . . . Although the petition for rehearing alleges that the fine is excessive, it does not indicate that the fine is excessive as a

> constitutional matter, be it state or federal. It certainly does not identify the Excessive Fines Clause of the Eighth Amendment to the Federal Constitution as the source of appellant's claim. Indeed, the crucial language from appellant's petition contains no reference whatsoever to the Eighth Amendment, the Federal Constitution or federal law. This failure to invoke the Federal Constitution is especially problematic in this case, because the Mississippi Constitution contains it owns Excessive Fines Clause (citation omitted). Thus, even if the Mississippi Supreme Court understood appellant to be offering a constitutional challenge, it may very well have taken that challenge to be anchored in the State Constitution. (citation omitted) . . . We therefore concluded that appellant's Eighth Amendment challenge, like its other challenges to the size of the punitive damages award, was not properly raised below.

486 U.S. at 77-78. In so holding, this Court cited *Taylor v. Illinois*, 484 U.S. 400, 407 n. 9 (1988) ("A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights . . . "), and *Webb v. Webb*, 451 U.S. 493, 501 (1981) ("At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law") (emphasis original).

In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), this Court declined to consider a

constitutional challenge because "TXO did not squarely argue in the West Virginia Supreme Court of Appeals that these aspects of the jury instruction violated the Due Process Clause. . . . " *Id.* at 464.

Under these precedents, this Court should decline to consider an issue which was not "squarely presented" to the appellate courts of Oklahoma, and which was not "pressed or passed upon below".

Wilkinson presents a single question in his Petition for Writ of Certiorari:

> Whether an attorney, against whom sanctions have been imposed in a civil case, has been denied the constitutional requirement of a neutral adjudicator when the Judge imposing the sanctions had previously determined essential issues of law directly related to the sanctions hearing.

Pet. Cert. at i. This Court should decline the Petition for Writ of Certiorari because this issue was not "squarely presented" to the appellate courts of Oklahoma.

Appeals from the District Courts of Oklahoma are commenced by filing a Petition in Error with the Oklahoma Supreme Court; all appeals then become subject to assignment by the Oklahoma Supreme Court to the Court of Appeals for consideration. Rules 1.14(a), 1.16(F), Rules of Appellate Procedure in Civil Cases, 12 O.S. Supp. 1995, Ch. 15, App. 2. After rendition of an Opinion by the Court of Appeals, an aggrieved party may then petition the Oklahoma Supreme Court for further review by Writ of Certiorari. Rule 3.13, Rules on Practice and Procedure

in the Court of Appeals and on Certiorari to that Court, 12 O.S. 1991, Ch. 15, App. 3.

Wilkinson commenced his Appeal from the order imposing sanctions by filing his Petition in Error with the Oklahoma Supreme Court on May 11, 1994. Wilkinson listed fifty-three "Issues and Error proposed to be Raised on Appeal" set forth on eight pages attached to his Petition in Error. Wilkinson's first issue was:

> The Trial Judge committed error by failing or refusing to do the following:
>
> 1. To recuse or disqualify as the Judge in determining the Application for Sanctions and for Costs and Fees considering the nature and background of the case.

So framed, the issue does not squarely raise a constitutional challenge under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Significantly, on page six of his Petition in Error, Wilkinson did not mark "constitutional law" as one of "the applicable issues involved in this appeal". See, Form of Petition in Error, Rule 1.16(C), Oklahoma Rules of Civil Appellate Procedure.

Wilkinson filed his Brief in Chief in his state appeal on December 23, 1994, and identified only a single proposition as addressed in his Brief: "THE SANCTIONS THAT WERE LEVIED BY THE TRIAL COURT RESULTED FROM AN ABUSE OF DISCRETION AND WERE CLEARLY ERRONEOUS." Wilkinson argued several subpropositions, none of which squarely raised a constitutional "due process" challenge to the circumstance that the same judge who presided over the trial also presided

over the hearing on sanctions. In sub-proposition H, ("THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARD"), Wilkinson argued that the trial judge misunderstood the applicable law and made an erroneous decision. Wilkinson argued a lack of impartiality on the part of the trial judge and "animosity toward Mr. Wilkinson", but only to suggest that the wrong standard had been applied. Wilkinson's Brief in Chief at pp. 25-26. To the contrary, the Hillcrest Respondents submit that the trial judge exhibited consummate skill and patience throughout the course of the underlying litigation. Nevertheless, the record shows that Wilkinson did not "press" a constitutional challenge in his appeal to the Oklahoma appellate courts. Wilkinson did not even argue that the trial judge erred by declining to recuse himself. As a matter of Oklahoma law, an issue raised in the Petition in Error which is not argued in the Brief is considered abandoned. *Perry v. Meek*, 618 P.2d 934, 938 (Okla. 1980). Accordingly, Wilkinson abandoned the trial judge's refusal to recuse as a proposition to be considered in his appeal.

The appeal was assigned to Division IV of the Oklahoma Court of Appeals, which, on September 5, 1995, issued its Opinion. That opinion was subsequently withdrawn, and a new Opinion filed September 26, 1995. The court noted that of the fifty-three propositions listed in the Petition in Error, only one, (whether or not the sanctions levied were an abuse of the trial court's discretion) was preserved in the Brief. Pet. App. at 6a. In fact, nowhere in the Opinion did that court suggest a challenge to the trial judge's impartiality, and certainly not

one based upon the constitutional guarantee of "due process".

On October 16, 1995, Wilkinson filed a Petition for Rehearing with the Oklahoma Court of Appeals, but did not at any point argue error based on the trial judge's refusal to recuse himself. Wilkinson did challenge the appellate judge who authored the Opinion, and the entire appellate panel, but relied exclusively upon state law. Wilkinson does not include that issue in his Petition for Writ of Certiorari filed with this Court.

The Oklahoma Court of Appeals denied Wilkinson's Petition for Rehearing by an Order filed November 20, 1995. Wilkinson then petitioned the Oklahoma Supreme Court for further review by Writ of Certiorari on December 8, 1995. Wilkinson did not argue that the Due Process Clause of the Fourteenth Amendment to the United States Constitution was violated by the trial judge's refusal to recuse himself. Wilkinson did continue his challenge to the appellate panel. The Oklahoma Supreme Court denied Wilkinson's Petition for Writ of Certiorari on April 1, 1996, and mandate issued April 11, 1996. Pursuant to Rule 3.17, Rules of the Oklahoma Court of Appeals and on Certiorari to the Court: "If writ of certiorari is denied, no petition for rehearing may be filed in the Supreme Court".

In summary, Wilkinson is petitioning for certiorari in order to have this Court address an issue which was not presented to the appellate courts of the State of Oklahoma for consideration. The issue was neither pressed nor passed upon in the state courts. As that is the only issue presented by Wilkinson in his Petition for Writ of

Certiorari, it follows that his Petition should be denied. There is no issue which this Court should review in this matter.

B. WILKINSON RECEIVED DUE PROCESS.

This Court should deny Wilkinson's Petition for Writ of Certiorari; his right to due process as guaranteed by Fourteenth Amendment to the United States Constitution was not transgressed during the trial court proceedings leading to the imposition of sanctions. At no time, did Wilkinson present to an Oklahoma appellate court a due process challenge to the imposition of sanctions. Sanctions were not based exclusively upon the evidence, or lack thereof, at the trial of the underlying action. Instead, a separate two-day hearing was held, at which time Wilkinson could have shown the court the evidence he had. See, Pet. App. at 38a-39a, Finding XII.

Wilkinson's argument is based upon the "due process" requirement of the Fourteenth Amendment to the United States Constitution. Pet. Cert. at 2. Federal statutes such as 28 U.S.C. §§ 114, 445, or case law interpreting those statutes, have no application to the requirements for disqualification of a state court judge. That issue is a matter of state law. This Court has held: "[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level." *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 702 (1948), as quoted in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 820 (1986). "The Due Process Clause demarks only the outer boundaries of judicial disqualification." *Aetna v. Lavoie*, 475 U.S. at 828.

> Moreover, the traditional common-law rule was that disqualification for bias or prejudice was not permitted. (citations omitted) . . . The more recent trend has been towards the adoption of statutes that permit disqualifications for bias or prejudice. (citations omitted) But that alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.

Id. at 820. "[M]ore than mere allegations of bias and prejudice" were required for a Due Process violation; in that case it was shown that the judge had a "more direct stake in the outcome of th[e] case". *Id.* at 821. A judge must have "an interest in the outcome of th[e] case" to require recusal. *Id.* at 822. That interest must be "direct, personal, substantial [and] pecuniary." *Id.* at 822, 824, 826 (citation omitted). Wilkinson suggests no such interest, and his Petition for Certiorari should be denied.

The trial judge of whom Wilkinson now complains fully performed his function as an impartial adjudicator of issues presented him by opposing litigants. It was the Hillcrest Respondents who initially raised the question of their proper joinder as parties by seeking dismissal. It was the Hillcrest Respondents who sought summary judgment on the grounds that they did not perform services in connection with the surgery upon which the underlying action was based. The trial judge actually ruled favorably to Wilkinson on these matters. The trial judge allowed Wilkinson to proceed with this action, while admonishing him of the necessity to present viable claims against all defendants at trial.

Wilkinson's counsel of record relies upon a law journal article that he authored in which appears the following:

> The Supreme Court has never held that prior exposure to facts or prior adherence to a legal position violates due process.

Redish & Marshal, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 502 (1986). The mere circumstance that the trial judge had been previously exposed to many of the issues in the four-week long trial does not preclude him from also presiding over the hearing during which the Hillcrest Respondents, and other parties, sought sanctions against Wilkinson. At common law, "a judge was disqualified for direct pecuniary interest and for nothing else." Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 609 (1947).

Wilkinson relies primarily on, *In Re: Murchison*, 349 U.S. 133 (1955), in which, the judge in question had previously conducted a secret "judge-grand jury" proceeding.

> Michigan law authorizes any judge of its courts of record to act as a so-called "one-man grand jury". He can compel witnesses to appear before him in secret to testify about suspected crimes. We have previously held that such a Michigan "judge-grand jury" cannot consistently with the Due Process Clause of the Fourteenth Amendment summarily convict a witness of contempt for conduct in the secret hearings. . . .
>
> The petitioners, Murchison and White, were called as witnesses before a "one-man judge-grand jury". Murchison, a Detroit policeman,

> was interrogated at length in the judge's secret hearings where questions were asked him about suspected gambling in Detroit and bribery of policemen. His answers left the judge persuaded that he had committed perjury, particularly in view of other evidence before the "judge-grand jury". The judge then charged Murchison with perjury and ordered him to appear and show cause why he should not be punished for criminal contempt. White, the other Petitioner, was also summoned to appear as a witness in the same "one-man grand jury" hearing. Asked numerous questions about gambling and bribery, he refused to answer on the ground that he was entitled under Michigan law to have counsel present with him. The "judge-grand jury" charged White with contempt and ordered him to appear and show cause. The judge who had been the "grand jury" then tried both Petitioners in open Court, convicted and sentenced them for contempt.

349 U.S. at 133-135. This Court observed that "a 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror" and that "apparently the trial judge here did consider himself a part of the prosecution". *Id.* at 137 & n. 8. Thus, in *Murchison* a judge who actively *prosecuted* the defendants in *secret* proceedings, then convicted them based upon their actions in the secret proceedings. Nothing analogous to that situation occurred in the underlying case.

Moreover, the trial judge here did not impose sanctions based upon events occurring in "secret proceedings". The underlying trial was held in open court. Wilkinson was later afforded a separate two-day hearing

in a trial format. The Hillcrest Respondents, and other defendants also seeking sanctions, presented witnesses and other evidence in their behalf in support of their claim for sanctions; Wilkinson in turn was afforded the opportunity to call witnesses and introduce evidence to oppose the imposition of sanctions. Based upon the evidence at that hearing, the trial court imposed sanctions. No violation of Wilkinson's "due process" rights occurred during that process.

Wilkinson also relies upon *Tumey v. State of Ohio*, 273 U.S. 510 (1927), in which a town mayor was authorized by statute to impose fines on certain offenders. Tumey was arrested for unlawfully possessing intoxicating liquor, and was fined by the mayor. This Court found a due process violation because the mayor would have a direct personal interest in the payment of fees, and therefore in the imposition of the punishment.

> The fees which the mayor and marshall received in this case came to them by virtue of the general statutes of the state applying to all state cases, liquor and otherwise. The mayor was entitled to hold the legal fees taxed in his favor (citation omitted) . . . but no fees or costs in such cases are paid him except by the defendant, if convicted. There is, therefore, no way by which the mayor may be paid for his service as judge, if he does not convict those who are brought before him; nor is there any fund from which marshals, inspectors and detectives can be paid for their services in arresting and bringing to trial and furnishing the evidence to convict in such cases, except it be from the initial $500 which the village may vote from its treasury to set the court going or from a fund created by the

> fines thereafter collected from convicted defendants.

273 U.S. at 520. This Court found such a direct financial interest to be in violation of the defendant's due process rights:

> All questions of judicial qualification may not involve constitutional validity. Thus, matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters of legislative discretion (citation omitted). But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

273 U.S. at 523. Nothing similar to that personal financial interest exists in the instant case.

Additionally, in both *Murchison* and *Tumey*, the parties had raised "due process" challenges in the state court systems:

> Petitioners objected to being tried for contempt by this particular Judge for a number of reasons including . . . trial before the judge who was at the time the complainant, indicter and prosecutor, prosecuted a denial of the fair and impartial trial required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

349 U.S. at 135.

> Tumey . . . moved for his dismissal because of the disqualification of the mayor to try him under the Fourteenth Amendment.

273 U.S. at 515. However, in the instant case, Wilkinson did not raise his "due process" challenge in the courts of the State of Oklahoma. He may not raise them now in this Court.

In summary, Wilkinson's reliance upon *Murchison*, 349 U.S. 133, and *Tumey v. Ohio*, 273 U.S. 510, is misplaced. Nothing analogous to the situation in those cases was presented in the process by which sanctions were imposed upon Wilkinson. Wilkinson was afforded a separate hearing at which he had the opportunity to present witnesses and other evidence in his behalf. The trial judge had no direct, personal interest in the imposition of sanctions. No "due process" violation may be predicated on these circumstances.

C. THE OKLAHOMA COURT OF APPEALS DID NOT ERR REGARDING THE TRIAL COURT'S EVIDENTIARY RULINGS.

The Oklahoma Court of Appeals did not err in its discussion of trial court evidence presented by Wilkinson regarding possible liability of the Hillcrest Respondents. At first glance, it is unclear how this issue is relevant to whether this Court should grant certiorari to review the imposition of sanctions. Nevertheless, the Oklahoma Court of Appeals was correct and Wilkinson failed to present any evidence at trial which would support liability of the Hillcrest Respondents. At the sanctions hearing, Wilkinson failed to show the court what evidence he

had to support claims against the Hillcrest Respondents. Pet. App. at 38a-39a, Finding XII.

Wilkinson appears to argue that "the refusal by the Oklahoma Court of Appeals to review the trial court's evidentiary rulings on the ground that 'that allegation of trial error has been waived', APP. 15a, does not constitute such an independent and adequate state ground [as would preclude a review of a refusal to adjudicate an issue of federal law]". Pet. Cert. at 21. On the one hand, there was no "state court's refusal to adjudicate an issue of federal law" for the simple reason that no issue of federal law was ever presented to the Oklahoma Court of Appeals for review. See, Pet. Cert. at 21. Specifically, Wilkinson did not raise his "due process" challenge in the Oklahoma courts. On the other hand, the action of which Wilkinson complains is fully in accord with the law of the State of Oklahoma and there is no federal issue implicated which would warrant review by this Court.

It is necessary to distinguish the four-week long trial during which Wilkinson attempted to present a case against twenty separate defendants, occurring in the spring of 1993, and the two-day hearing on sanctions occurring in March, 1994. The evidentiary rulings of which Wilkinson complains occurred during the trial, not during the sanctions hearing. Following his defeat at trial, Wilkinson was fired by his former clients, who obtained new counsel. With new counsel, the underlying claim was settled, and no ruling was ever made by the Trial Court on the pending Motion for New Trial, nor was any appeal ever taken from the Trial Court judgment. Accordingly, evidentiary rulings at trial were beyond appellate review.

Prior to trial, Wilkinson had been admonished by the trial judge that he would need to present sufficient evidence to make a prima facie case against each of the multiple Defendants who had been sued. At the time, Wilkinson relied upon an affidavit from a specific individual, Diane Miller-Hardy, and assured the trial judge that, at trial, this witness would offer testimony to support a claim against the Hillcrest Respondents. Nevertheless, at trial, Wilkinson did not call that individual as a witness. Only one witness offered any testimony which mentioned the Hillcrest Respondents: Lonnie Wright, a hospital consultant from Scottsdale, Arizona. The majority of his testimony addressed hospital accreditation and the adoption of standards, which would relate exclusively to the hospital, and not to the separate corporate entities, the Hillcrest Respondents. Trial Transcript, Vol. XIII, pp. 2966-3028. This witness was not identified in the Pre-Trial Order as offering testimony as to the relationship between the hospital and the Hillcrest Respondents. Record at 6518, Pre-Trial Order, p. 82. In his deposition, this witness had stated that he had no opinions on the subject. Nevertheless, the trial judge allowed this witness to testify over objection, a ruling which would be to Wilkinson's benefit. Record at 10,067 Trial Transcript, Vol. XIII, pp. 3029-30. Wilkinson showed this witness two documents, a directory from the board of trustees for Hillcrest Medical Center and Hillcrest Healthcare Corporation and a directory for Hillcrest Medical Center Foundation, Inc. These documents were neither offered nor admitted into evidence. Based upon these documents, the witness observed a "commonality" between the executive committee and officers of the corporations, and stated

that this is a "customary practice" among hospitals in general. However, the witness offered no testimony about the actual relations among the hospital and the Hillcrest Respondents.

When objections to some of Wilkinson's questions were sustained, Wilkinson did not make an offer of proof. Without an offer of proof, Wilkinson had no error to raise on appeal; without an error to raise on appeal, Wilkinson could not contend that the dismissal of the Hillcrest Respondents was improper. See, *Braden v. Hendricks*, 695 P.2d 1343, 1349 (Okla. 1985); *Haskins v. Felder*, 270 P.2d 960, 963 (Okla. 1954); *Oklahoma Tax Commission v. Price*, 197 Okla. 1, 167 P.2d 873, 876 (1946).

Following Wilkinson's defeat at trial, the Hillcrest Respondents (but not the hospital) moved for sanctions, on which a hearing was held March 29 and 30, 1994. At that time, Wilkinson had the opportunity to present to the trial court his evidence in support of a claim against the Hillcrest Respondents. Wilkinson did not offer any such evidence during the hearing on sanctions.

> Mr. Bill V. Wilkinson and the law firm failed to meet their burden of proof in opposing the Defendant's motions for sanctions by wholly failing to reveal what, if any, evidence was accumulated prior to the time that the Amended Petition was filed or during discovery in respect to the liability for each Hillcrest Entity. Instead, Mr. Bill V. Wilkinson merely attempted to demonstrate that the Court was mistaken on certain evidentiary rulings during the trial, as based on his "interpretation" and that but for these rulings, the "evidence" would have come in. The Court is still left to speculate whether the

> required "evidence" ever existed and the exact nature of the evidence. The focus of the authorities and argument of Mr. Bill V. Wilkinson was totally misdirected and nonsensical. Again, the fact that evidentiary rulings were made, even if adverse to his unique understanding of the Rules of Evidence, does not preclude Mr. Bill V. Wilkinson from now revealing to the Court the precise evidence he accumulated to meet the requirements of 12 O.S. § 2011 and to establish liability. Mr. Wilkinson still fails to understand that the separate act of each Defendant must be shown to create liability for any of them.

Pet. App. at 38a-39a, Finding XII. The trial judge did not rely merely upon the absence of evidence at trial to impose sanctions upon Wilkinson. Instead Wilkinson was provided the opportunity to come forth with the evidence he thought should have been admitted, in order to demonstrate that he had a viable case against the Hillcrest Respondents. Wilkinson failed to do this, and the sanctions were properly imposed by the trial court.

On appeal, the Oklahoma Court of Appeals reviewed the evidence presented by Wilkinson at trial, but did not limit its review to that evidence:

> At trial, however, Wilkinson did not call Miller-Hardy to testify. Instead, Wilkinson presented the trial testimony of Dr. Wright, who testified there was a "commonality" of personnel between the board of directors of the various Hillcrest Entities and HMC. The focus of Wright's testimony was on the accreditation process and the adoption of certain standards of care at Hillcrest Medical Center, but had little or nothing to do with the Hillcrest Entities or their

> relationship to each other. The trial court did not permit Wright to testify further concerning the interrelationship between Hillcrest Medical Center and the Hillcrest Entities, as it was clear the witness' familiarity with those entities was limited, and thus lacked sufficient foundation to be used as a basis of expert opinion. While Wilkinson's brief upon appeal claims this evidence was improperly excluded, that allegation of trial error has been waived. We are left with a record containing the single bare allegation that the various Hillcrest Entities have some common board members. We have reviewed the deposition transcript of Dr. Wright taken June 27, 1992, which was opened and reviewed by the trial court. The Pre-Trial testimony of Dr. Wright is critical of some of the Anesthesiologists, but contains no opinions on the relationship between Hillcrest Medical Center and the Hillcrest Entities. Indeed, Wilkinson has not pointed out any such references to this court in any of his Briefs.

Pet. App. at 15a. The Oklahoma Court of Appeals searched the record created by Wilkinson in an effort to determine whether there was evidence supporting a claim against the Hillcrest Respondents. It could find none.

Wilkinson's witness could only observe a "commonality" among the boards of directors of various corporations, as observed from various documents. The Oklahoma Court of Appeals correctly observed: "[t]he showing of a common board of directors and a unity of corporate purpose is insufficient to pierce the corporate veil" so as to hold the Hillcrest Respondents responsible

for a liability of the hospital, a distinct corporate entity. Pet. App. at 17a, citing *Wallace v. Tulsa Yellow Cab Taxi & Baggage Co.*, 178 Okla. 15, 61 P.2d 645 (1936). As the Court specifically held:

> We have meticulously reviewed the record to find evidence introduced by Wilkinson to prove his allegation of inter-corporate agency and an agency relationship between HMC, the Hillcrest Entities, and the individual defendant physicians as alleged by Wilkinson. We find no objective convincing evidence of such.

Pet. App. at 17a. The opinion of the Oklahoma Court of Appeals was neither "arbitrary" nor "utterly irrational". See, Pet. Cert. at 23.

In summary, Wilkinson was not sanctioned solely because he failed to present a claim against the Hillcrest Respondents at trial, but because the record as a whole failed to show a legitimate claim. Wilkinson did not present additional evidence to support the claim at the hearing on sanctions. There is no error in the Opinion of the Oklahoma Court of Appeals, and no refusal by that court to address an issue of federal law. In fact, no such issue was presented to it.

III. CONCLUSION

WHEREFORE, premises considered, the Respondents, Hillcrest Healthcare Corporation, Hillcrest Medical Center Foundation, Hillcrest Real Estate, Inc., and Hillcrest Service Company pray this Court to deny Petitioners' Petition for Writ of Certiorari. The record in this

case clearly establishes that Petitioner was properly sanctioned by the District Court of Tulsa County, State of Oklahoma, and that there was no error in the Opinion of the Oklahoma Court of Appeals affirming certain of those sanctions. Petitioner joined these Respondents as parties to litigation without any proper basis for doing so; he was continuously warned prior to trial of the possibility of sanctions should he fail to present a case against each Defendant, including Respondents. Nevertheless, Petitioner went to trial against Respondents, but failed to make a case against them, for which he was properly sanctioned. No "due process" violation occurred in that process, and certainly no such issue was presented to the Appellate Courts of Oklahoma for consideration.

Respectfully submitted,

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